No. 22092

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD R. CLEMENTS, Trustee in Bankruptcy of the Bankrupt Estates of STONE MOUNTAIN SNIDER, dba SNIDER FAMILY MARKETS, and RUBY E. SNIDER,

Appellant,

vs.

AUSTIN T. SNIDER and ANGELINE M. SNIDER, dba SNIDER FAMILY MARKETS,

Appellees.

APPELLANT'S REPLY BRIEF.

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POINT I.

The Acknowledgment Is Invalid if the Certificate Is Incorrect.

Appellees major defense is to attempt to distinguish between the act of acknowledgment and the certificate of acknowledgment. No such distinction is made in the California authorities. For example, Section 1185 of the Civil Code of California purports to set forth the requisites of the act of acknowledgment.

> The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such

> acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf.

Note that this code section does not require the person making the acknowledgment to personally appear before the officer taking the acknowledgment. Yet the law is now clear that unless the persons do personally appear before the officer taking the acknowledgment, the acknowledgment and the instrument is defective.

> *Martin v. Crocker-Citizens National Bank,* 349 F. 2d 580 (1965).

Where then in the law is there such a requirement? It is only found in the *form of the certificate of acknowledgment,* set forth in Section 1189 of the Civil Code of California.

In the *Martin* case it was clear the proper parties actually did sign the chattel mortgage.

> On its premises, and under the supervision of its agents, the officers of the mortgagor signed the mortgage, and were allowed to depart without having acknowledged their signatures. (P. 583.)

There was no contention that the notary public, who was an employee of the Bank, had any reason to doubt the authenticity of the signatures, which in fact were authentic. Only the certificate was false, and knowingly false.

The rule of strict compliance with the form of the certificate as set forth in Civil Code Section 1189 was followed in *Emeric v. Alvarado,* 90 Cal. 444, 478, 27 Pac. 356 (1891). There a deed was held not properly acknowledged because of the untruth of material statements in the certificate.

The certificate of acknowledgment in a deed to one Patrick stated incorrectly that the certifier was a notary public in the city and county of San Francisco, while in fact, the notary public was only qualified in Contra Costa County, which his seal, affixed to the certificate, clearly showed. The deed had been acknowledged properly by the notary in Contra Costa County. Thus the only error was contained in the certificate of acknowledgment which read, in part:

> State of California, City and County of San Francisco s.s.
>
> On this eight day of December, A.D., 1879 before me, H. I. Tillofson, a notary public in and for said city and county. . . .

The court held material statements in the certificate were not true, and thus invalidated the acknowledgment. Are false statements concerning the capacity of the acknowledging office more material than a knowingly false date? Obviously not. Particularly when the error, in Emeric certificate, could be seen from the notary seal. It was not so apparent in the case at hand.

Appellees interpretation of the holding of this case, to the effect that "the officer taking the acknowledgment was not a notary in the County where the acknowledgment purportedly took place," (Appellees Br. p. 9. 1st par.) is not correct. The notary was such where the acknowledgment was made. Only the certificate was erroneous as to where it took place and as to the Notary's capacity in that county. Had the notary simply deleted the words "San Francisco," and inserted the words "Contra Costa" the certificate would have been true, and the acknowledgment valid.

Again, in *Kelsey v. Dunlap,* 7 Cal. 160 (1856), and *Bryan v. Ramirez,* 8 Cal. 461 (1858) there was no question but that the act of acknowledgment took place, and the signatures were authentic. The acknowledgments were held invalid, however, because the *certificates* were defective, and did not comply with Civil Code Section 1189.

Appellant cites *Brown v. Title Ins. Etc. Co.,* 51 Cal. App. 65, 196 Pac. 114 (1921) which held a certificate of acknowledgment valid even though the date was incorrect because of a clerical error. The case is distinguishable on two grounds.

1. No clerical error occurred in the case at hand. Appellant's notary knew the date was false when he signed the certificate and he did not change the date of the certificate to the correct date.

2. The correct date in the *Brown* case could be determined from the instrument itself. But in the case at hand the mortgage was also incorrectly dated, and thus the correct date could not be so determined.

Appellee cites authorities from many other jurisdictions, holding an error in the certificate, or an incorrect date, do not invalidate the instrument. But *Martin v. Crocker-Citizens National Bank (supra)* points out why only California authorities are applicable. And all California authorities hold the correctness of the certificate is essential, even when the act of acknowledgment is done properly.

Respectfully submitted,

Richard M. Moneymaker,
Attorney for Appellant.

Certificate.

I certify that, in the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. M. MONEYMAKER